THE CO-OPERATIVE CENTRAL BANK LTD

v.

YM RAJA TAN SRI AZNAM RAJA HJ AHMAD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[COMMERCIAL SUIT NO: D4-23-268-88]
6 JANUARY 2004

CIVIL PROCEDURE: *Costs - Security for costs - Application by first defendant delayed - Whether delay inordinate - Whether plaintiff unable to pay first defendant's costs - Whether plaintiff suing in its own right - Whether plaintiff prejudiced by application*

This was the first defendant's appeal against the decision of the learned senior assistant registrar dismissing the first defendant's application for security for costs. The plaintiff's writ was instituted in 1988, but the first defendant only filed his application for security for costs in 2002 a prolonged delay of more than fourteen years. The issue requiring consideration was whether there were grounds to allow the appeal.

Held:

[1] An application for security for costs should be made as promptly as possible. Even though the nature and quantum of the plaintiff's claim had not changed since 1988, the first defendant did not appear to be too concerned about his litigation costs until the year 2002. He had filed his application for security for costs fourteen odd years later, which was too late in the day. The first defendant's failure to come to court promptly had deprived the plaintiff of the opportunity to re-assess its position before proceeding to embark on the present litigation on a full scale basis. (pp 377 e-f & 378 b)

[2] Notwithstanding that there were liabilities stated in the balance sheet, it could not, by any stretch of the imagination, be said that the plaintiff would be unable to pay the costs of the first defendant if so ordered by this court at the conclusion of the trial. The plaintiff had in hand "cash and short term funds" of RM5.326 million as at 31 December 2000, and the first defendant had failed to produce figures to contradict the plaintiff's financial status. Furthermore, there was evidence emanating from the first defendant's own affidavit that the plaintiff had funds from other sources. (pp 378 f-g & 379 a)

[3] It was quite plain from the relevant documents that the plaintiff continued to maintain its legal interest in all non-vested assets such as the subject matter of the claim, all other excluded assets and excluded liabilities. Thus, the plaintiff could not be said to be a nominal plaintiff but rather, in fact and in law, a plaintiff suing in its own right. (pp 379 e & 380 d)

[4] On the facts, it was apparent that the first defendant's application for security for costs for trial preparation at the High Court level computed at RM250,000 as getting up costs was exorbitant and clearly intended to stifle the plaintiff's claim and prejudice the plaintiff accordingly. (p 380 f)

[Appeal dismissed.]

Case(s) referred to:
Adarsh Pandit v. Viking Engineering Sdn Bhd [1996] 1 LNS 350 ***(dist)***
Cowell v. Taylor [1885] 31 Ch D 34 ***(refd)***
Datuk Mohd Sari Datuk Hj Nuar v. Idris Hydraulic (M) Bhd [1996] 3 CLJ 877 HC ***(dist)***
Le Mesurier v. Ferguson [1903] 20 TLR 32 ***(refd)***
Lin Securities (Pte) v. Noone & Co Sdn Bhd and Klang Jaya Bharu Development Bhd [1989] 2 CLJ 844; [1989] 2 CLJ (Rep) 73 HC ***(dist)***
Semler v. Murphy [1967] 2 All ER 185 ***(dist)***

For the plaintiff - Phang Sweet Ping; M/s Albar & Partners
For the 1st defendant - Azhar Azizah Harun; M/s Shafee & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was the first defendant's appeal against the decision of the learned senior assistant registrar dismissing with costs the first defendant's application for security for costs as seen in encl. 87. The first defendant's notice of appeal to the judge in chambers can be seen in encl. 101.

The Facts And The Law

The plaintiff's writ was instituted on 28 January 1988 but the first defendant only made his written request for security for costs through his solicitors on 4 February 2002 and he only filed his application for security for costs in encl. 87 on 18 June 2002. There was an inordinate and prolonged delay of fourteen (14) years four (4) months and twenty (20) days before the first defendant filed his application for security for costs in encl. 87. The first defendant now sought to justify and explain away that inordinate delay.

It must be borne in mind that the first defendant saw it fit not to ask for security for costs much earlier in the day when the plaintiff's writ was first instituted. The first defendant too was not troubled by his high escalating costs. Thus far, the first defendant had incurred the sum of RM250,000 for the High Court trial preparation and a further sum of RM60,000 for the Federal Court appeal. It was only after the plaintiff had set in motion the trial preparation by filing the notice for pre-trial case management on 3 December 2001 that the first defendant was motivated to file encl. 87 on 18 June 2002. The first defendant maintained the stand that there was no delay whatsoever for the following reasons:

(1) the first defendant's appeal to the Federal Court against the summary judgment entered in 1991 was only disposed off on 5 November 2001 and the first defendant vigorously relied on the authorities of *Lin Securities (Pte) v. Noone & Co. Sdn. Bhd.* and *Klang Jaya Bharu Development Bhd.* [1989] 2 CLJ 844; [1989] 2 CLJ (Rep) 73 and *Adarsh Pandit v. Viking Engineering Sdn Bhd* [1996] 1 LNS 350; and

(2) the court vacation and the festive season at the end of 2001 and in early 2002.

It is trite law that an application for security for costs should be made as promptly as possible. There must be some measure of promptitude. Here, there was none.

It must be borne in mind that the nature and quantum of the plaintiff's claim has not changed since 1988. Nevertheless the first defendant did not appear to be too concerned about his litigation costs until the year 2002. The facts in the *Lin Securities* case can readily be distinguished. In that case, the defendant there thought it fit to apply for security for costs promptly upon realising that the plaintiff there was in liquidation. Here, the first defendant was aware that since 1988 Bank Negara Malaysia had assumed control over the plaintiff pursuant to and under the provisions of the Essential (Protection of Depositors) Regulations 1986 and that the receivers too have been appointed. Yet, sad to say, no application for security for costs was filed then.

The case of *Adarsh Pandit* can also be distinguished. A reading of that case will show that what was really being complained about was the tardiness of the defendant there in having the application for security for costs to be heard. There, the defendant explained the delay and the explanation was accepted by the learned Judicial Commissioner. It was explained that the defendant there

had, in fact, applied for security for costs in 1988 when the suit was first filed in 1988 but the intervening events prevented the application for security for costs from being heard earlier. Here, the facts were totally different. Fourteen odd years later, the first defendant filed his application for security for costs. Too late in the day. I must hold and it was part and parcel of my judgment that the first defendant's failure to come to court promptly has deprived the plaintiff of the opportunity to re-assess its position before it proceeded to embark on the present litigation on a full scale basis. To this extent, the plaintiff must surely be prejudiced by the inordinate delay in filing encl. 87.

I will now proceed to examine other inter-related issues. I will do so now but I must categorise them accordingly.

Will The Plaintiff Be Unable To Pay The Costs Of The First Defendant If The Court So Ordered?

It must be emphasised that the Bank Negara Malaysia appointee had averred on oath that there were sufficient funds whether emanating from the plaintiff or from other sources – such as Maybank Allied Bhd formerly known as Phileo Allied Bank (Malaysia) Berhad which was formerly known as Allied Bank, to meet any taxed costs at the conclusion of the trial. Reference should also be made to the audited accounts of the plaintiff for the year 2000 which would show that there were ample "cash and short term funds of RM5.326 million" in favour of the plaintiff and they consisted of cash in hand and short term funds.

In my judgment, these figures would tell a different story – a story in favour of the plaintiff. Notwithstanding that there were liabilities as stated in the balance sheet, it cannot, by any stretch of the imagination, be said that the plaintiff would be unable to pay the costs of the first defendant if so ordered by this court at the conclusion of the trial. The plaintiff had in hand "cash and short term funds" of RM5.326 million as at 31 December 2000. It must be emphasised that the first defendant had failed to produce figures to contradict the plaintiff's financial status.

It has been said, time and again, that insolvency or poverty of a plaintiff cannot be a ground to require him to give security for costs (*Cowell v. Taylor* [1885] 31 Ch. D 34; and *Le Mesurier v. Ferguson* [1903] 20 TLR 32). It is also true that the court has a wide discretionary power to order security for costs and in exercising its discretion the court must have regard to all the circumstances of the case.

I took note of the fact that there was evidence emanating from the first defendant's own affidavit that the plaintiff has funds from other sources. This would be the damning feature of the present appeal.

It was submitted *en passant* that Maybank Allied ought to be made a party to the action herein so that the issue of indemnity would be set at rest. This was, in my view, entirely misconceived. The first defendant exhibited certain documents and one particular document would bear this out and it was worded as follows:

> Any and all costs and expenses incurred in the action for the recovery of loans by the plaintiff shall be for the account of the purchaser.

The "purchaser" here would refer to "Maybank Allied" and so there was no necessity to make the latter a party to the action. At any rate, the facts in *Semler v. Murphy* [1967] 2 All ER 185 CA; and in *Datuk Mohd Sari bin Datuk Hj Nuar v. Idris Hydraulic (M) Bhd* [1996] 3 CLJ 877 referred to by the first defendant were entirely different from the facts of the present appeal by virtue of the express terms of the sale and purchase agreement as well as the vesting order. The facts here were poles apart from those two cases.

Was The Plaintiff A "Nominal Plaintiff" Suing For The Benefit Of Allied Bank (Malaysia) Berhad?

For this exercise, I must allude to the facts once again. It was quite plain that from the documents the plaintiff continued to maintain its legal interest in all non-vested assets – such as the subject matter of the claim, and all other excluded assets and excluded liabilities. The sale and purchase agreement (assets and liabilities) marked as exh. "TSA2" of encl. 88 would bear this out particularly cls. 6.3, 6.5 and 6.6 thereto. I believe it would be appropriate to reproduce these clauses in quick succession:

> 6.3 It is hereby expressly stipulated that in relation to those investments held by CCB in cooperative societies and those outstanding Loans and Advances which are pending legal proceedings or in the process of being recovered by CCB and more particularly set out in the Schedule II hereto, notwithstanding the Transfer Date hereof, the said investments and outstanding Loans and Advances shall continue to be vested in CCB and be held in the name of CCB until such investments are realised and such Loans and Advances are recovered or restructured by CCB from time to time.

6.5 CCB shall in this respect, use its best endeavours to take all necessary steps, execute all necessary documents and carry out all necessary acts to realise the investments and recover and/or restructure the aforesaid Loans and Advances Provided Always That all costs and expenses incurred thereof shall be for the account of the Purchaser and CCB shall be entitled to deduct from the proceeds of realisation and/or recovery such costs and expenses incurred.

6.6. Unless otherwise mutually agreed between the parties hereto, CCB's obligation under this Clause 6 herein shall continue until all those investments and outstanding Loans and Advances set out in Schedule II hereto are fully realised, recovered and/or restructured by CCB and the proceeds therefrom are duly transferred and vested in the Purchaser. Pursuant thereto, CCB's obligation herein shall continue after the Transfer Date.

So it can be surmised that the plaintiff cannot be said to be a nominal plaintiff but rather, in fact and in law, a plaintiff suing in its own right.

The First Defendant's Appeal In Enclosure 101

It was my judgment that the first defendant's appeal in encl. 101 should be dismissed with costs.

Given that the first defendant has taken out a separate bill of costs claiming a sum of RM40,000 as getting up costs in relation to the first defendant's appeal to the Federal Court and given the fact that the first defendant has every intention to take out separate bills of costs in the High Court for the hearing of the summary judgment before the registrar and before the judge in chambers during the course of the appeal, it would be apparent that the first defendant's application for security for costs for trial preparation at the High Court level computed at RM250,000 as getting up costs was exorbitant and clearly intended to stifle the plaintiff's claim and prejudice the plaintiff accordingly.

Conclusion

For all these reasons, encl. 101 must be dismissed with costs.